No. 09-689

U.S.
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In The Supreme Court of the United States

MARK J. HUNSBERGER;
CHERYL A. HUNSBERGER,

Petitioners,

v.

J. A. WOOD, Deputy Sheriff,
Botetourt County Sheriff's Office,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether this Court should deny the petition where the Fourth Circuit Court of Appeals correctly found that Sergeant Wood lawfully searched a home without a warrant where a neighbor reported suspicious activity and the absence of homeowners, Sergeant Wood observed activity confirming that persons were in the house that should not be there, a concerned father reported that his step-daughter could not be found, and doors into the home were unsecured?

II. Whether this Court should deny the petition where, even if the search was not lawful, the law was not clearly established and an officer, under the circumstances confronted by Sergeant Wood could reasonably believe that his actions were lawful given that courts have found warrantless searches of homes constitutional in circumstances that were less compelling than those faced by Sergeant Wood?

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STATEMENT OF THE CASE

Petitioners begin their statement of facts with an attempt to outrage this Court by stating that Sergeant Wood exposed the unclothed body of a young girl during the course of the search of a home. (Pet. at 3.) There is absolutely no evidence that petitioners' daughter, who is not a party to this action, was unclothed. While looking for a missing girl, the bed covers of the girl were pulled down, from the foot of the bed, revealing her face to the tops of her shoulders at the head of the bed and revealing the fact that she was not the missing girl. (JA 1348-48, 1457.[1]) Petitioners' daughter was mad because Sergeant Wood was shining a flashlight and she was trying to sleep. (JA 1444.)

The facts in the record show that on the evening of Friday, February 2, 2007, and into the early morning hours of Saturday, February 3, 2007, Sergeant Jeff Wood, an eighteen year veteran of the Botetourt County Sheriff's Office, was confronted with two 911 calls from a neighbor reporting suspicious activity at the petitioners', Mr. and Mrs. Hunsberger's, home. The Hunsbergers were reportedly out of town and the neighbor was worried that the house was being vandalized. Sergeant Wood observed suspicious activity at the house, thought a person or persons had fled the house when a previously closed door was found open, learned of a missing girl whose car was parked in front of the house, and, after observing that someone was still in the house, entered the house to make sure the home

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[1] Citations to "JA" are citations to the Joint Appendix filed with the Fourth Circuit Court of Appeals.

was not being vandalized and to look for and check on the missing girl. Twenty-four days later, Sergeant Wood was sued by Mr. and Mrs. Hunsberger.

The material facts pertinent to this appeal are undisputed. Sergeant Jeff Wood and Deputy Jody Edwards were dispatched based upon two 911 calls placed by Charlene Klik, a neighbor and self-described friend of the Hunsbergers, because of suspicious activity at the Hunsberger home. (JA 1098-99, 1267, 1275, 1411.) Ms. Klik thought that the Hunsbergers were on vacation and she became concerned when she noticed multiple cars coming and going from the Hunsberger home and the activity in the front of the home. (JA 221-22, 225, 231.) Ms. Klik thought that the Hunsberger home was being vandalized or burglarized. (JA 221-23, 230.)

Indeed, other testimony supports the coming and going of vehicles and activity in front of the house. The Hunsberger's teenage boys and five of their friends were at the house and made multiple trips in and out of the house. (JA 51-53, 55-56, 128, 139-40, 276, 634, 705, 1102.) Throughout the evening, some of the teens were drinking beer and/or vodka despite the fact that the Hunsbergers told their oldest son that there would be no alcohol in the house. (JA 46, 633.) The Hunsbergers themselves were home and went to bed upstairs where their daughter was also sleeping. The Hunsbergers testified that they were unaware of any of the activities in and around their house except they

knew that their sons were down in the basement with two other boys. (JA 944-45, 1478, 1482.)

In responding to the first 911 call Sergeant Wood observed two vehicles parked in front of the house and some lights on in the house. No persons or suspicious activity was observed at this time, so he left the scene. (JA 1102, 1107, 1270.)

Ms. Klik continued to notice additional cars and additional suspicious activity at the Hunsberger home. (JA 237-40, 244.) This is again consistent with the teenagers' activities and the coming and going of people and vehicles. (JA 54-55, 94, 138, 146, 508, 521.) Ms. Klik placed her second call to the Botetourt County 911 at 12:10 a.m. (JA 913-17.) Both Deputy Edwards and Sergeant Wood were again dispatched to the Hunsberger home. (JA 239, 915-17.) When the officers arrived at the Hunsberger home the second time, they noticed the presence of an additional third car parked in front of the home. (JA 1110.) One car was sticking out into the road more than the others, and the manner in which the cars were parked concerned Sergeant Wood because they were partially blocking the road and creating a hazard. (JA 1279, 1281.) Sergeant Wood parked his car and observed from a distance that there were lights on inside the home, and through the garage window he observed the lights in the garage come on, and a young man enter the garage from inside the home, quickly pass by the window, and then leave the garage. (JA 1276.)

Deputy Edwards again spoke with Ms. Klik and informed Sergeant Wood that the homeowners

were out of town and that Ms. Klik was concerned for the homeowners' property. (JA 1269.) She thought the house was being vandalized and that the Hunsbergers were on vacation. (JA 221-23.) Sergeant Wood, himself, had not spoken with Ms. Klik.

Approaching the Hunsberger House – Lights

The two officers decided to approach the Hunsberger home to find the owners of the vehicles to ask them to move their cars, and to determine what was going on in response to Ms. Klik's concerns. (JA 1117-18, 1283-84.) Sergeant Wood and Deputy Edwards pulled both their vehicles into the Hunsberger driveway and, as they were about halfway up the driveway, the lights in the interior of the home on the first floor went out. (JA 1118-19, 1284.)

Contrary to petitioners' contention that the lights did not go out, this fact is not disputed. Matt Deane was talking about garage lights when he testified that the lights were off and had been turned off for awhile. (JA 148-49.) Mr. Deane, one of the teen friends, was outside when he first saw the law enforcement vehicles cut their lights off up the road and all of the sudden they were pulling in the Hunsbergers' driveway (JA 148). When shown his Virginia State Police statement, Mr. Deane stated that he warned Zach Hunsberger that the officers were there and he ducked under the garage window and either AH or Zach Hunsberger cut the lights off (JA 173). The teens did not recall if the lights on the main floor of the house were on or off or if anyone

turned lights off as they scrambled to hide from the officers. (JA 81, 306, 538, 651-52.)

Doorbell

Sergeant Wood walked to the front porch and rang the doorbell normally and then 25 to 30 times when there was no response. (JA 1120, 1289-90.) Both Sergeant Wood and Deputy Edwards could hear the doorbell ringing from the front porch. (JA 1120-21, 1290.) Matt Deane saw the officers approaching the front door and look like they were starting to knock before he ran from the house, and Zach Hunsberger saw the officer going towards the front door before he left. (JA 149, 652.) When no one responded to the doorbell, Sergeant Wood and Deputy Edwards walked back to their cars in the driveway. (JA 1121, 1291.)

According to Mr. Hunsberger, the doorbell box is in the front hallway by the front door. (JA 941.) Mr. Hunsberger tested the doorbell that night when he was told they had been ringing it because "sometimes their doorbell doesn't work. (JA 964.) Mr. Hunsberger pushed it at that point and it did ring, but it was very soft. It's a very soft doorbell." (JA 964.)

The Hunsbergers and their daughter were sleeping. (JA 947, 949-50, 1484-85.) The Hunsbergers claim to have heard nothing the entire evening, including the teens many trips in and out of the house, the knocking and banging on the basement door, or the shouts for NW that the teens reported, so it is no surprise that they did not hear

the doorbell. (JA 950, 1486.) Similarly, the teens were not in a position to hear the knocking or door bell – some of the teens, including the petitioners' son, had fled the home and the other teens were hiding in a closet under the basement stairwell. Aaron Cooper, NW and AH hid in a small closet area under the basement stairwell. (JA 57, 60.) LH went up to his room. (JA 750.)

Open Door

As they were walking from the front door back to the driveway, Sergeant Wood and Deputy Edwards noticed a walk-in door on the side of the garage (which led from outside into the garage) was now open. This same door had been closed when they first pulled into the driveway minutes before. (JA 1122, 1291-92.) Sergeant Wood explained that at this point he assumed that someone had exited the home from that garage door as he was ringing the doorbell. (JA 1295.) He did not know whether anyone remained in the house.

Again petitioners then try to make an issue of the walk-through garage door and whether the officers observed it to be open when this fact is undisputed. Petitioners contend that Matt Deane said he shut the door. Matt Deane actually testified that Zach Hunsberger was right behind him at the walk-through door; they opened the door, walked out and then shut it, left out the backyard and just took off. (JA 150.) Matt Deane did not say who shut the door, but in any event Zach Hunsberger was behind him. Zach Hunsberger testified that he left through the walk-through garage door on the side with Matt

Deane following him and they ran to a friend's house. (JA 652.) The boys ran (JA 150, 652); they did not stay around to see if the door had latched properly. Mr. Hunsberger testified that Sergeant Wood told Mr. Hunsberger that the door was ajar. (JA 985.) Mr. Hunsberger was not surprised as "that door doesn't always close properly...." (JA 985.)

Upon discovery of the now open door, Sergeant Wood entered the garage and shined his flashlight around the garage. (JA 1292-93.) Sergeant Wood saw a stairwell that led from the interior of the garage to the basement and a closed door at the bottom of this set of stairs. (JA 1294.) He went down the stairs and knocked on the basement door. (JA 1294.) After receiving no response, Sergeant Wood left the house, returned to his car and moved his car back onto the street. (JA 1295.)

Contact with Vehicle Owners

Sergeant Wood then contacted the dispatcher to run the license plates so he could contact with the owners of the vehicles parked in front of the Hunsberger home. (JA 1296, 1298-99, 1303.) Sergeant Wood spoke on his cell phone with Matt Deane's mother, Aaron Cooper's mother and NW's stepfather, Mr. Blessard. (JA 1303, 1305.) Each parent indicated that he or she would come to collect their vehicle. (JA 1305.) Sergeant Wood cautioned that the drivers of the vehicles might be drunk and unable to operate the vehicles.[2] (JA 1603-32.)

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[2] Vandalism and teen drinking are not mutually exclusive.

Sergeant Wood explained his concerns as follows:

> I have an open door which is an unsecure dwelling, I have information that the homeowners are gone, out of town, I've seen people in this home, so I don't know if it's being robbed like Ms. Klik told me, if it's being vandalized. I'm concerned for basically the property of the Hunsbergers.

(JA 1304.) Sergeant Wood also explained that he was concerned because, approximately two weeks earlier, another home in the neighborhood had been burned down. (JA 1315-17, 1338.) He had previously found that vacant home unsecured, as it was on the security check list, and found evidence of people having been in the house drinking and burning candles. (JA 1362.)

Defendant Blessard arrives at the Hunsberger Home and is Concerned

Mr. Blessard was the first of the parents to arrive at the Hunsberger home. (JA 1306.) When he arrived at the scene, he was greeted by Sergeant Wood, who explained to him what had transpired that evening. (JA 373-74, 1308.) Mr. Blessard observed NW's car parked in a haphazard fashion in front of the Hunsberger home. (JA 366.) He did not know or know of the Hunsbergers. (JA 374, 377.) Mr. Blessard and Sergeant Wood then discussed the fact that his stepdaughter, NW, was supposed to be

sleeping over at a girlfriend's home and that she was not supposed to be at this – the Hunsberger -- residence. (JA 368, 1308.) Mr. Blessard had "deep concern for [his] daughter" at this time. (JA 369.) He tried to call NW on her cell phone without success, which was unusual. (JA 375-76.) He explained his mindset at the time as follows: "I mean, something was going on and I didn't understand what was going on." (JA 376.)

Amazingly, petitioners try to manufacture a disputed fact because Mr. Blessard's emotional state was not set forth in Sergeant Wood's report. They speculate that perhaps Blessard really did not care about the well-being of his stepdaughter. Even Mr. Hunsberger commented that NW's father was worried sick (JA 966), and the teens' testimony that they heard beating on the basement door (JA 64-65) and heard him yelling for NW while in the house (JA 64-65, 289, 556, 762).

Noise in Garage

Sergeant Wood suggested that they approach the home together to see if Blessard could get someone to come to the door so that they could find his daughter. (JA 1308.) As Sergeant Wood and Blessard passed the garage on the way to the front door, they heard a noise like something being knocked over in the garage. (JA 401, 1309 – 10, 1421.) Sergeant Wood immediately went to the walk-in door on the side of the garage (which had been open earlier) thinking that someone might be trying to leave the home. (JA 1309.) Sergeant Wood entered this door into the garage and heard the door

at the bottom of the stair well into the basement shut and lock.[3] (JA 1309.) Blessard then entered the garage and Sergeant Wood explained to him that he heard the door at the bottom of the stairs leading into the basement shut and lock. (JA 1311.) Aaron Cooper admits that he went up the basement steps, which would require him to first open the door, and "they heard me shut the door or go down the stairs...." (JA 64-65.) In other words, Aaron Cooper admits he made noise in the garage even if he did not knock anything over. Mr. Blessard then descended the stairwell (from the interior of the garage to the basement) and knocked loudly and was beating on the basement door calling out for NW. (JA 65, 1311, 1314.) Many of the teens reported hearing this. (JA 65, 971-72, 74, 762, 1518.) Meanwhile, Deputy Edwards left the area when he saw Ms. Cooper pull up to retrieve one of the vehicles. (JA 1147.)

Entry into Home

Sergeant Wood explained that at this point in time he knew: (i) that someone was still in the home; (ii) that there was an open door to the home; and (iii) that the Hunsbergers have been reported by a concerned neighbor and friend to be out of town. (JA 1314.) Sergeant Wood then proceeded to the door leading from the garage into the home and found that this door was unlocked. (JA 1314-15.) Sergeant Wood explained:

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[3] This is the stairwell that leads from the interior of the garage to the basement.

> Basically now I have an open door and an unsecured door on a home that the homeowners are gone, and I've seen people in this home that have acted suspiciously in the fact that a simple doorbell ringing, knocking on the door, they won't come to the door, all the lights went off when I approached the home. All that's adding up to the suspicion of these people don't belong in this home, whoever is here could be robbing it, tearing it up, vandalizing it, I'm not sure. Just down the street here we had a home burn down from, apparently, people coming in it and I don't know what all they were doing in there, but it was a vacant home that was for sale and it ended up burning down [shortly before this incident].

(JA 1315-16.) In addition to the concerns regarding the Hunsbergers' home, Sergeant Wood explained his concern regarding NW as follows: "She's 16 years old, it's past her curfew, she's not where she's supposed to be ...." (JA 1321.)

Sergeant Wood then entered the home through the door from the garage with the goal of finding Blessard's missing stepdaughter and whoever else was improperly in the house.[4] (JA 1317, 1321.) Sergeant Wood proceeded to canvas the interior of the home using his flashlight. (JA

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[4] Deputy Edwards report does not state that he went into the home – he notes that he entered the garage. (JA 1179.)

1322.) Sergeant Wood loudly announced himself in the home. (JA 1328.) Blessard followed Sergeant Wood into the home, and the two went downstairs to the basement. (JA 1323.) Blessard was not invited to enter the home by Sergeant Wood – nothing was said. (JA 1361.) Sergeant Wood proceeded to search the basement, where he noticed an open carton of beer on the floor. (JA 1326-27.) After failing to locate anyone in the basement, they returned to the main level of the home and searched the main level. (JA 1331-32.) Up until this point, Sergeant Wood had not said anything to Blessard inside the home. (JA 1335.)

Express or Implied Consent

The parties do dispute whether there was expressed or implied consent with regard to Mr. Blessard's presence in the house.

Sergeant Wood then proceeded to the second floor of the home and Blessard followed. (JA 1336-37.) After confirming that the first bedroom was clear, Sergeant Wood proceeded to the second bedroom where he observed a dog walk out of the closet. (JA 1340-41.) Sergeant Wood then discovered LH sitting on the floor of his closet in his boxer shorts. (JA 1343.) When Sergeant Wood asked LH where everyone was, LH responded, "They are not here," as if he was asking a question. (JA 1344.) He was asked if he was home alone and he just kept saying "Huh?" or "What?" (JA 424.) LH remembers Sergeant Wood asking him where NW was. (JA 756.) LH then just walked past Sergeant Wood and proceeded down stairs without seeking out

his parents. (JA 1344.) Sergeant Wood then proceeded to the next bedroom where he saw a young girl laying in bed awake. (JA 1346.)

Sergeant Wood testified that he moved the covers off the girl's face to her chin so that he could see her face. (JA 1349.) Blessard, who was standing in the doorway, confirmed to Sergeant Wood that the girl was not his daughter. (JA 1350.) The Hunsbergers' daughter testified that both men pulled her covers down to just below her shoulders from the bottom of the bed. (JA 1441-42, 1456-67.) Sergeant Wood testified that the girl stated *in a normal voice*, "Turn the lights out, they are not in here." (JA 1350-51.) The Hunsberger daughter testified in her deposition that her only statement to Sergeant Wood was, "Go away. I'm trying to sleep" and "Stop it." (JA 1441, 1444.)[5] Sergeant Wood then exited the girl's room and was confronted by Mr. Hunsberger in the hall. (JA 1351.) Mr. Hunsberger confirmed to Sergeant Wood that he was the homeowner and the three men went downstairs. (JA 1353.)

As Sergeant Wood stated, everything changed when he found out the homeowners were present. He realized the information given by the neighbor was inaccurate. (JA 1354.) The search, which lasted maybe ten minutes (JA 1366), was over.

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[5] Both Mr. and Mrs. Hunsberger claim that their daughter screamed but their daughter did not claim that she screamed. (JA 950, 1486.)

Post Search

After they descended the stairs and entered the kitchen, Sergeant Wood was attempting to explain to Mr. Hunsberger why they were in the home – including the fact that there was a missing teenage girl whose car was parked in front of Mr. Hunsberger's home. (JA 955, 1355, 1373.) He told Mr. Hunsberger he was advised that the homeowners were not home. (JA 435, 1353, 1355, 1357.) Mr. Hunsberger does not remember exactly what Sergeant Wood was saying. (JA 956.) While Mr. Hunsberger asserted that Sergeant Wood just kept repeating that he was looking for Mr. Blessard's daughter (JA 953-55), he was reminded throughout his deposition of other items that Sergeant Wood had explained. He explained that the garage door was ajar. (JA 958.) He may have explained that he searched the house and no one was found. (JA 967.) The Hunsbergers told the State Police that Sergeant Wood could have been looking for intruders being that the door was open. (JA 1052.) Mr. Hunsberger told Sergeant Wood to leave his house. (JA 1355, 1373.) The concerns about NW were ignored by the Hunsbergers. Mrs. Hunsberger called 911 to report a breaking and entering by Sergeant Wood. (JA 956, 959-60, 1357, 1488, 1491-92.) Both Sergeant Wood and Mr. Blessard then left the Hunsberger home. (JA 1359.) Not surprisingly, Sergeant Wood expected them to file a complaint, so he called for his supervisor. (JA 1358-59.)

About fifteen minutes after Mrs. Hunsberger's 911 call, Lieutenant Blessard (no relation to Mr. Blessard) of the Botetourt County Sheriff's Office

arrived at the Hunsberger home to take their complaint. (JA 960-61, 963-64.) The Hunsbergers spoke with Lieutenant Blessard for about ten to fifteen minutes. (JA 964.)

The Hunsbergers found the teens hiding in the basement, and Mr. Hunsberger told his wife to take NW home because her father "is worried sick about her." (JA 964-66.)

REASONS FOR DENYING THE PETITION

Petitioners have not presented compelling reasons for review by this Court, as required by Rule 10 of the Supreme Court Rules, because petitioners' alleged disputes of fact are not supported by the record, the factual findings of the Court of Appeals were not erroneous, and the Court of Appeals' decision is consistent with precedent. The Court of Appeals correctly found that petitioners suffered no constitutional violation and, even if a constitutional violation occurred, Sergeant Wood would still be entitled to qualified immunity as the law was not clearly established.

I. The Court of Appeals Did Not Overlook or Misapprehend the Summary Judgment Standard or the Facts.

Petitioners again assert, as they did before the Fourth Circuit Court of Appeals, that there are genuine issues of material fact that preclude the granting of summary judgment. Petitioners then attempt to manufacture issues of fact based upon speculation and snippets of testimony taken out of

context. However, the facts relied upon in the Court of Appeals are either not in dispute or are construed in a light most favorable to petitioners.

The summary judgment standard was not overlooked or misapprehended by the Court of Appeals. Where the nonmoving party "will bear the burden of proof at trial on a dispositive issue," the nonmoving party bears the burden of production under Rule 56 to "designate specific facts showing that there is a genuine issue for trial" (internal quotation marks omitted)). *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Petitioners bear the burden of proof as to whether the facts show a violation of a constitutional right. *Bryant v. City of Cayce*, 332 Fed. Appx. 129, 132 (4th Cir. 2009).

As this Court recently reiterated, "[o]n a motion for summary judgment, 'facts must be viewed in the light most favorable to the nonmoving party only if there is a 'genuine' dispute as to those facts. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2677 (2009) (quoting *Scott v. Harris*, 550 U.S. 372, 380 (2007)). Indeed, the nonmoving party cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another. *Barwick v. Celotex Corp.*, 736 F.2d 946, 963 (4th Cir. 1984). "Genuine" disputes are those that show a true conflict between established facts. *Nasis-Parsons v. Wynne*, 2006 WL 1555913 at *2 (E.D. Va. 2006) (citing *Thompson Everett, Inc. v. Nat'l Cable Adver., L.P.*, 57 F.3d 1317, 1323 (4th Cir. 1995)). Genuine disputes are not created through "[a] mere scintilla of evidence," *Nguyen v. CNA Corp.*, 44 F.3d 234, 237 (4th Cir. 1995), "[m]ere

unsupported speculation," *Ennis v. Nat'l Ass'n of Bus. & Ed. Radio, Inc.*, 53 F.3d 55, 62 (4th Cir. 1996), "mere belief or conjecture," *Doyle v. Sentry Ins.*, 877 F. Supp. 1002, 1005 (E.D. Va. 1995), or the "mere . . . building of one inference upon another," *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985). In determining the "materiality" of facts, the Court is to consider "the actual quantum and quality of proof necessary" to support the non-moving party's claim, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986), and those facts that "address . . . the adequacy of the showing made by [the non-moving party and] . . . whether such a showing, if reduced to admissible evidence, would be sufficient to carry [the non-moving party's] burden of proof at trial." *Celotex Corp. v. Catrette*, 477 U.S. 317, 327 (1986).

The alleged genuine issues of material fact do not exist and are not created just because petitioners do not care for the facts and wish they were disputed. Most of the alleged disputes are addressed in the Statement of the Case and are briefly summarized below.

Lights

The fact that the lights on the first floor of he house went off as the officers were about halfway into the driveway (JA 1119, 1284) is not disputed. Petitioners' reliance upon the testimony of Matt Deane is misplaced. When Mr. Deane testified that the lights had been off for some time he was talking about the garage lights. With regard to the lights on the main floor of the house, no teen can recall what lights were on or if anyone turned them off. (JA 81,

306, 538, 651.) Testimony of witnesses to the effect that they do not know whether someone turned the lights off is insufficient to create a dispute.

Open Door

Each teen who fled the house claims that the other teen was behind him and shut the door. In any event, the boys were running from the house on a cold February night – one boy possibly without shoes. (JA 156, 661.) They were in a hury. They did not stick around to see if the door had properly latched. Indeed, Mr. Hunsberger testified that Officer Wood told Mr. Hunsberger that the door was ajar. (JA 985.) Mr. Hunsberger was not surprised as "that door doesn't always close properly...." (JA 985.) Again, no dispute of fact is created.

Ringing the Doorbell

Petitioners then question whether Sergeant Wood knocked at the door or rang the doorbell. This argument defies common sense and ignores the undisputed circumstances. The fleeing boys, before they fled, saw the officers approach the house as if to knock on the front door. (JA 149, 652.) Mr. Hunsberger admitted that when the doorbell works it is very soft and the doorbell box is not located in the basement with the teens or upstairs with the sleeping petitioners. (JA 964.)

Noise in Garage

The noise in the garage that both Sergeant Wood and Mr. Blessard heard and that Aaron

Cooper admits to making is then questioned because Deputy Edwards did not mention a noise in his report. (JA 64-65, 401, 1309, 1421 (Wood report).) Mr. Cooper knew that they heard him because, shortly after he shut and locked the door, Mr. Blessard knocked loudly on the basement door calling out for his stepdaughter. (JA 64-65, 1311, 1314.)

Concern for Stepdaughter

Most amazingly, petitioners find a disputed fact because Mr. Blessard's emotional state was not set forth in Sergeant Wood's report. They speculate that perhaps Mr. Blessard really did not care about the well-being of his stepdaughter. This contention is ridiculous given petitioners' description of Mr. Blessard's state as "maniacal" (Brief of Appellees filed in the Fourth Circuit Court of Appeals, p. 15), Mr. Hunsberger's comment that NW's father was worried sick (JA 966), and the teens' testimony that they heard beating on the basement door (JA 64-65) and heard him yelling for NW while in the house (JA 64-65, 289, 556, 762).

Express or Implied Consent

The Court of Appeals recognized that the parties dispute whether Sergeant Wood consented to Mr. Blessard's presence or Mr. Blessard merely followed Sergeant Wood into the house. The decision states, "[e]ven accepting as true petitioners' contention that Wood consented to Blessard's presence, the search was not unreasonable." Slip Op. at 15. The Court acknowledged this dispute, but

found it immaterial to its decision looking at it in a light most favorable to petitioners.

Both Sergeant Wood and the Court of Appeals considered all of the circumstances, and the culmination of the same, confronting Sergeant Wood at the time. According to petitioners, the Fourth Circuit decision overlooked the fact that the officers found nothing suspicious after the neighbor's first 911 call and then found suspicious activity after the second 911 call. The second 911 call in and of itself did not create the emergency. As the Fourth Circuit decision makes clear, it was the many suspicious events and observations after that call that rose to the level of an emergency need to enter the house. The fact that observation through certain windows did not show suspicious activity did not eliminate the suspicious events and observations that were made. The Court's opinion did not find that the second 911 call created an imminent emergency. Moreover, the fact that two of the vehicles belonged to the homeowners is irrelevant to whether or not the homeowners were present. It is a rare family that would take all of its vehicles on vacation.

The material facts are not in dispute. Petitioners' selective use of only certain testimony, disregard of other testimony, use of testimony taken out of context, and pure speculation cannot create disputes of material fact.

II. The Court of Appeals Correctly Held that Sergeant Wood was Entitled to Qualified Immunity Since He Did Not Violate the Constitution and, Even if a Violation Were to be Found, He is Still Entitled to Qualified Immunity Since the Law Was Not Clearly Established.

The Fourth Circuit Court of Appeals' decision is consistent with the precedent of this Court and other federal courts of appeals. Moreover, even if this Court were to find a constitutional violation, Sergeant Wood would still be entitled to qualified immunity. There is no compelling reason for the granting of the petition.

When qualified immunity is asserted, the Court looks to whether the facts show that the defendant violated the constitutional rights of the plaintiff and whether the right was clearly established at the time such that a reasonable official would know that his conduct was unlawful. *Saucier v. Katz*, 533 U.S. 194, 200 (2001). After *Pearson* overruled *Saucier* as to a mandated order of consideration of the questions, courts have discretion to consider either of the prongs of the analysis first. *Pearson v. Callahan*, 129 S. Ct. 808, 818 (2009). If the answer to either question is no, then qualified immunity applies. In this case, the answer to both prongs is no.

A. The Standard Set Forth in *United States v. Moss*, which standard Petitioners do not contest, was Correctly Applied to Result in No Fourth Amendment Violation and is Consistent with this Court's Decision in *Brigham City v. Stuart*.

As the Fourth Circuit Court of Appeals stated very recently in discussing the Fourth Amendment and the Due Process Clause, "the Amendments are not rigid; they protect by insisting on judicial oversight, not by pressing inflexible rules." *Mora v. City of Gaithersburg*, 519 F.3d 216, 222 (4th Cir. 2008) (upholding warrantless search of luggage, van, and apartment and seizure of items following outside handcuffing of firefighter who called a hotline stating that he was suicidal, had weapons in his apartment, could understand shooting people at work and might as well die at work). The Court recognized that "the Fourth Amendment favors a warrant based on probable cause, but 'because the ultimate touchstone of the Fourth Amendment is 'reasonableness,' the warrant requirement is subject to certain exceptions.'" *Id.* (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)). Exigent circumstances are noted as one of those exceptions. The Fourth Circuit applied the standard set forth by it in *United States v. Moss*, 963 F.2d 673 (4th Cir. 1992), and correctly held that Sergeant Wood did not violate the Hunsbergers' constitutional rights.

The question before the Court of Appeals in applying the standard was "whether the circumstances known to Sergeant Wood would create an 'objectively reasonable belief that an emergency

existed that required immediate entry to render assistance or prevent harm to person or property within.'" *Hunsberger v. Wood*, 570 F.3d 546, 555 (W.D. Va. 2009) (quoting *United States v. Moss*, 963 F.2d 673, 678 (4th Cir. 1992)). Petitioners do not contend that this standard is improper. Rather, they contend that the Court of Appeals ignored the "imminent danger" or "required immediate entry" requirement and that the "objectively reasonable belief" must be equivalent to probable cause.

An examination of cases decided under the emergency and community caretaker doctrines is instructive in reviewing the actions of Sergeant Wood and the standard applied by the court. This Court recognized in *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973) (involving automobile impoundment), that law enforcement officers not only investigate crimes and apprehend criminals, but they act to protect citizens – their persons and their property. Communities expect their officers to serve and protect. Officers are expected to come to the aid and assistance of the citizens they serve. As LaFave stated,

> [Q]uite clearly police have occasion to enter premises without a warrant for a variety of ... purposes. The police have "complex and multiple tasks to perform in addition to identifying and apprehending persons committing serious criminal offenses"; by design or default, the police are also expected to "reduce the opportunities for the commission of some crimes through

> preventive patrol and other measures," "aid individuals who are in danger of physical harm," "assist those who cannot care for themselves," "resolve conflict," "create and maintain a feeling of security in the community," and "provide other services on an emergency basis.

3 W. LaFave, *Search and Seizure* § 6.6 at 389-90 (1996), *quoted in Wood v. Commonwealth*, 27 Va. App. 21, 33, 497 S.E.2d 484, 490 (1998) (en banc) (Annunziata, J., dissenting).

Courts have extended the recognition of this role to permit warrantless entries into homes under both the emergency doctrine (or the emergency aid doctrine) and the community caretaker doctrine.[6] The doctrines permit warrantless entries to protect persons or property. *Michigan v. Fisher*, 130 S. Ct. 546 (2009); *Brigham City v. Stuart*, 547 U.S. 398 (2006); *United States v. Moss*, 963 F.2d 673, 678 (4th Cir. 1992) (citing 2 W. LaFave, *Search and Seizure* § 6.6) (1987)), *United States v. Dart*, 747 F.2d 263 (4th Cir. 1984); *United States v. Gillenwaters*, 890 F.2d 679 (4th Cir. 1989); *Phillips v. Peddle*, 7 Fed. Appx. 175, 178 (4th Cir. 2001) (unpublished) (citing *Cady v. Dombrowski*, 413 U.S. 433 (1973)); and *United States v. Newbourn*, 600 F.2d 452 (4th Cir. 1979). *See also Love v. State*, 659 S.E.2d 835, 836 (Ga. App. 2008)

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[6] This Court made no reference to the community caretaking doctrine in *Brigham City*, but it appears that neither doctrine would include a requirement that the actions be divorced from an investigation of crime since motive is irrelevant to the analysis. 547 U.S. 398, 400, 404-05 (2006).

(search upheld where neighbor called 911 to report door open and no one appeared to be home although car was parked at house and there was no response to verbal calls).

In *Moss*, the court noted that the emergency doctrine requirements of "an objectively reasonable belief that an emergency existed that required immediate entry to render assistance or prevent harm to persons or property within" was not met because there was no indication that any illegal occupant was inside so there was no immediate danger to the cabin or anyone inside. *Moss*, 963 F.2d at 678 -79 (citations omitted). In this case, there were indications that an illegal occupant was inside the house.

The First Circuit Court of Appeals distinguished *Moss* on this point when it upheld the warrantless entry into a home. *United States v. Tibolt*, 72 F.3d 965, 970 (1st Cir. 1995). The officer in *Tibolt* responded to a security alarm that he thought was activated at the Tibolt residence. It was actually activated at a nearby residence. *Id.* at 967. The officer found an unlocked door and called inside receiving no response. *Id.* The court noted that the officers believed that the residents were away and they found an unlocked door which increased the likelihood of an intruder. *Id.* at 970. If the officers had not entered the house, they could not know if an intruder was present or if there was an injured or captured resident. *Id.*

The district court also addressed the emergency doctrine and found it applicable, in a case

with less compelling facts than the case at hand, where officers responded to a security alarm at a home. *United States v. Porter*, 288 F. Supp. 2d 716 (W.D. Va. 2003). Upon arrival at the home, the officers were told by two people that a young neighborhood girl had accidentally opened the back door and activated the alarm while attending a cookout next door. *Id.* at 717. There was no audible alarm upon arrival, no response to a knock, there were no signs of forced entry, and the back door was closed and unlocked. *Id.* The officers entered the house to see "if a crime was in progress or if there was anyone inside in need of assistance." *Id.* at 719. The Court said the emergency doctrine applies when the officer holds an objectively reasonable belief that "an emergency existed that required immediate entry to render assistance or prevent harm to person or property within." *Id.* at 720 (quoting *United States v. Moss*, 963 F.2d 673, 678 (4th Cir. 1992)). The court listed many cases where officers were permitted to enter homes after a reported burglary or in response to security alarms. *Id.* The court noted that, while the alarm itself together with an unlocked door would justify entry, *id.* at 721, this case required examination of the information from the neighbors that indicated no burglary occurred. *Id.* The court, in deferring to the officers' judgment, noted that, "the conduct of the officers in this instance was exactly the type of police work the community would expect, and possibly even demand." *Id.*

The Virginia Court of Appeals, again in a less compelling factual situation, while not addressing the emergency doctrine or the community caretaker

doctrine, found that exigent circumstances permitted the entry into a home by officers when a neighbor called and reported that the homeowner was out of town for two days and the front door was open. *Hill v. Commonwealth*, 441 S.E.2d 50 (Va. App. 1994), The neighbor wanted the officers to see if the home had been broken into. *Id.* The officers spoke with the neighbor and saw the front door open with a closed storm door. *Id.* They knocked and rang the doorbell with no response. *Id.* The officers then opened the unlocked storm door and announced themselves. *Id.* They looked in closets and under beds for a possible burglar and found marijuana plants. *Id.* at 50-51. The court found that the officers had probable cause to believe that the house had been unlawfully entered and they reasonably believed the burglar might still be in the house. *Id.* at 51. The officers had a "duty" "to determine whether Hill's house had, in fact, been burglarized, to apprehend the burglar, and to resecure the premises." *Id.*

Sergeant Wood had more of an objectively reasonable belief that an emergency existed that required immediate entry to render assistance or prevent harm to persons or property within than did the officers in the cases listed above. Although he had been told of reports of suspicious activity, told that the homeowners were gone, and observed suspicious activity himself, he refrained from entering the house when it appeared that there might not be anyone in the house anymore. When he found that a closed door was then open, he suspected that a person or persons fled the house. After looking in the garage and finding no one, at

that time, he had no reason to believe anyone else was in the house posing a danger to persons or property. After that, he learned of Mr. Blessard's missing daughter, that she was supposed to be somewhere else and that she was not answering her cell phone. He heard the noise in the garage followed by footsteps and the slamming and locking of the door. He then knew that someone was indeed in the house posing a danger to persons or property, and he made an immediate entry.

Petitioners contend that the standard set forth in *Moss* as applied by the Court of Appeals is improper under *Whiteley v. Warden*, 401 U.S. 560 (1971), and *United States v. Moses*, 540 F.3d 263 (4th Cir. 2008) (decided after the events of this case), because the Fourth Circuit did not demand that the objectively reasonable belief equal probable cause. The cases, however, are not factually similar to this case. *Whiteley* involved a warrantless arrest based upon an informant's tip where no exigent circumstances were involved. 401 U.S. at 563-64, 567. *Moses* discusses the standard to be applied where the officers have an interest in contraband. When contraband is involved, the officers must have probable cause that contraband will be found and then also show exigent circumstances – whether an objective officer could reasonably believe that evidence was on the verge of being destroyed. *Moses*, 540 F.3d at 270.

Notably, in a more factually similar case decided by this Court, probable cause is not mentioned as a requirement. *Brigham City v. Stuart*, 547 U.S. 398 (2006). Rather, the standard

set forth in *Brigham City* was whether the officers were objectively reasonable in their belief. *Id.* at 406. This is the same standard applied in *Moss* – whether the officers had an objectively reasonable belief that an emergency existed that required immediate entry to render assistance or prevent harm to person or property within. 963 F.2d at 678. *Brigham City* involved a situation where officers observed an assault upon a person in the house. The question was whether the officers were objectively reasonable in their belief that "the injured adult might need help and that the violence in the kitchen was just beginning." *Brigham City*, 547 U.S. at 406. The Court in *Brigham City* mentions the need to protect an occupant from "imminent injury." *Id.* at 404. This same standard is found in *Moss* where the emergency requires "immediate entry." 963 F.2d at 678.

In a case involving the warrantless search of the home of an individual who might have been considering mass murder, this Court allowed officers to take preventative actions. *Mora v. City of Gaithersburg*, 519 F.3d 216 (4th Cir. 2008). In approving a balancing test for preventive action, the Court pointed out the objective reasonableness standard. *Id.* at 224-25. As with *Brigham City*, there is no mention of probable cause.

Sergeant Wood had an objectively reasonable belief that an emergency existed that required immediate entry to render assistance or prevent harm to person or property within. This is all that is required. While hindsight would show that there was no danger of harm to persons or property at the

Hunsberger home, hindsight was not the perspective available to Sergeant Wood or the perspective by which the Court examines the circumstances.

B. *Wilson v. Layne* Supports Mr. Blessard's Presence in the House.

While no case law was found specifically addressing the situation in this case, *Wilson v. Layne*, 526 U.S. 603 (1999), supports the Court of Appeals decision rather than being in conflict with the decision as argued by petitioners.[7] *Wilson* examined whether or not the presence of the third parties in the house was "related to the objective of the authorized intrusion." 526 U.S. at 611. The United States Marshals conceded that the news reporter and photographer did not assist the police in their task. They were "not present for any reason related to the justification for police entry into the home...." *Id.* The Court of Appeals conducted the same analysis in this case. Mr. Blessard was able to state that JH was not his stepdaughter and would have been able to identify his stepdaughter had she been found. Because of his presence, Sergeant Wood did not have to question JH. Mr. Blessard was present for a reason related to the justification for entry. There is no constitutional prohibition to the presence of a third party in and of itself, and there is

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[7] The panel decision is not in conflict with *Buonocore v. Harris* as *Buonocore* involved a private person allegedly present for his own purposes unrelated to the search and conducting a search independent from that of the officers. *Buonocore*, 65 F.3d 347, 359 (4th Cir. 1995). Petitioners do not allege a separate independent search by Mr. Blessard.

no requirement that the third party's presence be necessary.[8]

Moreover, victims of burglaries have been permitted to assist in searches where the officer is searching for the stolen items pursuant to a warrant. *See, e.g., United States v. Robertson*, 21 F.3d 1030, 1034 (10th Cir. 1994); *State v. Dallmann*, 441 N.W.2d 912, 917 (N.D. 1989); *State v. Klosterman*, 317 N.W.2d 796, 803 (N.D. 1982); *State v. Ricci,* 472 A.2d 291, 298 (R.I. 1984). Similarly, Mr. Blessard did act "in aid of" Sergeant Wood by providing assistance as to the identification of his stepdaughter.

One of the purposes of Sergeant Wood's entry into the house was to look for Mr. Blessard's stepdaughter. (JA 1321.) Mr. Blessard's only purpose was to locate his stepdaughter. (JA 402.) Certainly, if the Fourth Amendment allows a burglary victim to assist an officer in identifying his property, it allows a father to assist an officer in identifying his stepdaughter.

C. The Panel Decision Properly Granted Qualified Immunity to Sergeant Wood.

Even if one believed that a Fourth Amendment violation occurred, the Court would

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[8] Whether or not Mr. Blessard was acting under color of state law or as an agent of the government is not an issue before this Court. The district court found it unnecessary to determine whether Blessard acted under color of state law because he acted in good faith, and that issue is not on appeal. *Hunsberger v. Wood*, 564 F. Supp. 2d 559, 571 (W.D. Va. 2008). Only the qualified immunity denial with regard to Sergeant Wood was appealed.

then have to analyze whether or not the law was clearly established such that a reasonable officer under the circumstances would understand that his actions were unlawful. This is true even if officers of reasonable competence could disagree on whether the action was reasonable. *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *Springman v. Williams*, 122 F.3d 211, 214 (4th Cir. 1997). Under this standard, all but the "plainly incompetent or those who knowingly violated the law" are protected. *Malley*, 475 U.S. at 341. The cases conclusively demonstrate that Sergeant Wood is entitled to qualified immunity. Given the case law, a reasonable officer would not understand that his actions violated the petitioners' constitutional rights. Certainly, if reasonable judges differ as to the application of the law, reasonable officers could differ. *See Gable v. Lewis*, 201 F.3d 769, 774 (6th Cir. 2000) (Nelson, J., dissenting) ("we ought not to require Highway Patrol officers to be more prescient than Article III judges"); *Key v. Grayson*, 179 F.3d 996, 1002 (6th Cir. 1999), *cert. denied*, 528 U.S. 1120 (2000) ("if federal appellate judges could reasonably disagree [cannot say] reasonable official would have known"); *Griffith v. Truette*, 866 F. Supp. 254, 258 (D. Md. 1994) ("[s]ince even now reasonable lawyers and judges can disagree ...it follows that the defendants cannot be held to have known....").

Sergeant Wood was only doing what was demanded of him by his community under the circumstances presented to him and what was permitted by case law. Had Sergeant Wood done nothing despite being called to the house twice by 911 calls from a concerned neighbor with regard to

suspicious activity, having understood that the homeowners were out of town, having observed suspicious activity himself with all of the lights going out, no one answering the door despite seeing someone in the house, observing a closed door that was then open, and finally receiving a report of a missing, minor girl whose car was inexplicably found outside the house and whose stepfather could not make contact with her and then discovering that someone was still in the house, he would have been derelict in his duties. One can predict the justifiable consequences to Sergeant Wood had the Hunsbergers come home to discover they were victims of vandalism or had Mr. Blessard later discovered his missing child in need of assistance in the Hunsberger home.

CONCLUSION

Petitioners have not established any compelling reason for this Court to grant the Petition. Sergeant Wood respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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